No. 17783

United States
Court of Appeals
for the Ninth Circuit.

ALCUIN WILLENBRING,

Appellant,

v

UNITED STATES OF AMERICA,

Appellee.

PETITION TO REVIEW A DECISION OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

BRIEF FOR THE PETITIONER

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JURISDICTION

This appeal by ALCUIN WILLENBRING is taken from a judgment of conviction of the District Court of the United States for the Southern District of California, Central Division (United States of America, Plaintiff v. Alcuin Willenbring, Defendant, No. 29458-CD, indictment filed February 15, 1961), for a violation in two counts of 26 U.S.C. 7201 in that appellant

wilfully attempted to evade and defeat income taxes due the appellee during the years 1954 and 1955.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 2106.

STATEMENT OF CASE

HISTORY OF CASE

An indictment was returned by a Federal Grand Jury against the Appellant on February 15, 1961.

The Appellant voluntarily surrendered himself on May 3, 1961 and was arraigned before the Honorable Harris C. Westover, United States District Judge, on May 15, 1961.

The case was tried before the Honorable Gus Soloman, United States District Judge, commencing on November 21, 1961 and continuing through December 1, 1961, when the jury returned its verdict of guilty as to both counts of the indictment.

Sentence of four years imprisonment on each count to run concurrently and an aggregate fine of $10,000.00 was rendered on December 8, 1961.

It is from this verdict and sentence that this appeal is taken.

QUESTION PRESENTED

The question presented by this appeal is whether the Honorable Judge, Gus Soloman should have disqualified

himself upon the filing of the Affidavit of Bias by the Appellant under Title 28, Section 144, United States Code.

RESUME OF FACTS

Following the Appellant's indictment on February 15, 1961, he was arraigned before the Honorable Judge Harris C. Westover on May 15, 1961, at which time he entered a plea of not guilty and the Honorable Judge William M. Byrne was assigned to hear the case.

On May 23, 1961, a Motion for Bill of Particulars was filed by Appellant and the hearing was set for June 5, 1961 before Judge Byrne. On said latter date the hearing was continued on oral motion of the Government to June 12, 1961 and further continued to June 26, 1961 on written motion of appellant.

On June 19, 1961, Appellant filed an Amendment to his Motion for Bill of Particulars which was opposed by the Government. After a further continuance, the hearing on this motion and the amendment was had before Judge Byrne on July 10, 1961 at which time the Appellant's motion was granted in part and denied in part. At this same hearing the Appellant's motion for a continuance in order to allow time for inspection by Appellant of the Government's records was granted and the trial was then continued from

July 17, 1961 to November 21, 1961.

The above motions and arguments thereon were all heard by the Honorable Judge William M. Byrne.

On October 9, 1961, by order of the Honorable Peirson M. Hall, Chief Judge of the United States District Court, Southern District of California, Central Division, this case was transferred to the trial calendar of the Honorable Judge Albert Lee Stephens, Jr. This order was duly made and a written copy of same was timely furnished Appellant's attorney.

On November 17, 1961, Appellant's attorney was telephonically advised by the Government's attorney that this case had again been transferred to the Honorable Judge Gus Soloman who had requested the presence of defense counsel at a pre-trial conference on November 18, 1961. When advised that appellant's attorney would be unable to attend a conference on that date due to prior committments, Judge Soloman immediately came on the telephone and after some discussion ordered said counsel to attend said conference on November 18, 1961.

At the aforesaid pre-trial conference attended by the Government's and Appellant's attorneys, Appellant's attorney, Leonard B. Hankins became suspicious and suspected that the Honorable Judge Soloman had

previously discussed some of the facts in the case with the Government's attorney in the absence of Appellant's attorney.

The pre-trial conference was continued on November 20, 1961 with counsel for both parties and appellant in attendence. During the course of this conference Judge Soloman stated directly to appellant, "You are the one that is going to the penitentiary". [TR 2 and 3]

Prior to commencement of the trial on November 21, 1961, appellant filed an Affidavit of Bias under 28 U.S.C. 144 and motion that Judge Soloman disqualify himself and the reassignment of the case to Judge Byrne. This affidavit is part of the record for review on this appeal.

Judge Soloman denied the motion and proceeded with the trial. [TR 2 & 3].

Thereafter on December 1, 1961, a verdict of guilty as to both counts of the indictment was returned by the jury and on December 8, 1961, Appellant was sentenced to four years imprisonment on each count to run concurrently and was assessed an aggregate fine of $10,000.00.

SPECIFICATIONS OF ERRORS

The Trial Court erred in not disqualifying itself pursuant to Appellant's Affidavit of Bias filed under 28 U.S.C. 144.

ARGUMENT

RESUME OF ARGUMENT

The United States District Judge against whom error is claimed herein, was not assigned to instant case until a scant four days, including a Sunday, prior to trial. The facts giving rise to a belief of bias and prejudice were not complete until the day before trial and therefore the filing of the Affidavit of Bias was timely even though filed on the day of trial. The trial court did not take issue with the facts alleged in the affidavit but only concluded said affidavit was insufficient, even though it was accompanied by a certificate of counsel. The code section involved is mandatory on the Trial Court and said Court was therefore in error in refusing to disqualify itself by reason of the Affidavit of Bias filed prior to commencement of the trial under 28 U.S.C. 144.

ARGUMENT

Since this appeal is based directly on a section of the United States Code, it is deemed appropriate

to set forth said section before entering on a discussion of the issues involved. Title 28 U.S.C., Section 144, reads as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. As amended May 24, 1949, C. 139, Section 65, 63 Stat. 99."

The issue as to whether the Trial Court erred in not disqualifying itself can only be resolved by first resolving the following secondary issues:

1. Was Appellant's affidavit timely filed?

2. Was the affidavit sufficient?

3. Does the code section involved create discretion in the Trial Court or is it mandatory as to such judicial officer?

We will consider these secondary issues in the order mentioned.

FIRST: The question of the timeliness of the affidavit is apparent on the face of the record inasmuch as it was not filed until the day of trial. Clearly the code provides for the filing of such affidavits not less than ten days before the beginning of the term "or good cause shall be shown for failure to file it within such time".

In the case of HURD v LETTS, 1945, 152 F2d 121, 80 U.S. App. CD 233, it was held that the rule requiring an affidavit of bias to be filed in advance of trial was inapplicable where facts on which affidavit was based were not known to peitioners and their counsel until after commencement of trial.

Also, in MORRIS v U.S., C.C.A. Okl. 1928, 26 F2d 444, it was held that defendant's application to disqualify judge, filed on day following securing additional information, was not untimely. To the same effect is CHAFIN v U.S., C.C.A. W.Va. 1925 5 F2d 592, certiorari denied 46 S. Ct. 18, 296 U.S. 552.

Instant case was originally assigned to the Honorable William M. Byrne and later, but almost two months prior to the date of trial, was transferred to the Honorable Albert Lee Stephens, Jr. Notice of the further transfer of the case was not afforded Appellant's counsel until only four days prior to the date of the trial.

At that time Appellant's counsel was not acquainted with the Honorable Gus Soloman and had no facts on which to base an affidavit of bias. However, during the course of contact with Judge Soloman, Appellant's attorney became suspicious and suspected that the said Honorable Judge Soloman had been in conference with the Assistant United States Attorney assigned to the case in the absence of Appellant's counsel. This was evidenced by comments of the judge indicating a knowledge of certain facts of the case which could only have come to him from the Government's counsel since same had not been furnished him by Appellant's counsel.

Further, when Appellant's counsel was advised by telephone of the assignment of the case to Judge Soloman and his desire to hold an immediate pre-trial conference, the rapidity with which said Judge came on the telephone indicated to Appellant's counsel that he must have been in the room with the Government counsel.

A conclusion as to the existence of bias on the part of a judicial officer is not arrived at lightly nor hastily. Therefore, the filing of the affidavit of bias was not immediately undertaken although the demanor of the judge was such as to indicate an antagonism toward Appellant's counsel, if not toward Appellant himself.

It was not until November 20, 1961, the day before the trial was to commence that the appellant believed that a definite bias was indicated on the part of Judge Soloman. At that time during a pre-trial conference in his chambers at which were present the Government's counsel, Appellant and his counsel, the said Judge spoke directly to Appellant saying, "You are the one that is going to the penitentiary". It was at this time that the bias on the part of the Trial Court became apparent.

We submit that the facts indicating bias were not manifested until such a time as to preclude the filing of the affidavit within the time prescribed by the statute and that therefore the affidavit was timely filed within the spirit of the code and such constitutes good cause for filing same on the date of the trial.

Therefore, the refusal of the Trial Court to refuse to disqualify itself on the ground that the affidavit was not timely filed [TR. 11/21/61 P.4] was in error.

SECOND: Regarding the sufficiency of the affidavit filed herein, it was held in BERGER v U.S., Ill 1921, 41 S. Ct. 230, 255 U.S. 22, that an affidavit upon information and belief satisfies the provision of this section.

In NATIONS v U.S., C.C.A. Mo. 1926, 14 F2d 507, certiorari denied 47 S. Ct. 243, 273, U.S. 735, the affidavit stated that the defendant was informed and believed that persons connected with the government and having special interest in the prosecution had communicated to the trial judge what they claimed to be facts and circumstances connected with the charge made in the indictment, as a result of which said judge had formed and expressed an opinion that defendant was guilty, which affidavit was accompanied with a proper certificate of counsel, was sufficient under this section, and to require transfer of the cause to another judge.

Bias or prejudice on the part of a judge may exhibit itself prior to trial by acts or statements on his part, or it may appear during trial by reason of actions of judge in conduct of trial, and if it is known to exist before trial it furnishes basis for disqualification of judge to conduct the trial. KNAPP v KINSEY , 232 F2d 458, rehearing denied 235 F2d 129, Certiorari Denied 77 S. Ct. 131, 352 U.S. 892.

Instant case appears to fall clearly within the

purview of the above cited cases. Appellant's affidavit alleged facts upon information and belief showing that the Trial Court had conferred with witnesses, i.e., agents for the Government, prior to the trial; had conferred with Government counsel in the absence of Appellant's counsel; and that the conduct and remarks of the Trial Court made in the presence of Appellant were such as to make Appellant believe that a personal bias or prejudice against him did in fact exist.

Further, the certificate of appellant's counsel accompanied the affidavit thus showing that said affidavit was made in good faith and not for purposes of delay as stated by the Trial Court [TR. 11-21-61 P. 4].

We submit that in cases of this nature the secret attitudes of one's mind, whether he be judicial officer, attorney, defendant or prosecutor, cannot be determined by his mere denial of the existence of an opinion, bias, prejudice or idea [TR. 11-21-61, P.4], but that it must be determined by the acts and conduct of the person which leads others to believe what that attitude may be; that in instant case the Trial Court's acts and oral statements were such as to manifest a closed mind to Appellant's cause and therefore, the Trial Court was in error in not disqualifying himself in accordance with the affidavit filed herein.

THIRD: The duty of the Trial Court appears to be only to pass on the legal sufficiency of an affidavit of bias and certificate of the attorney and not to rule on the motive, truth or falsity of such affidavit.

When a party files an affidavit of a trial judge's disqualification because of personal bias against affiant or in favor of opposite party, the truth of all of the allegations of fact contained therein is admitted and it becomes the duty of the court to determine only its legal sufficiency, and if the affidavit meets the requirements of this section and is accompanied by a certificate of the counsel of record, the presiding judge can proceed no further but is disqualified. MITCHELL v U.S., C.C.A. N.M. 1942, 126 F2d 550, Cert. Denied 62 S. Ct. 1307, 316 U.S. 702, rehearing denied 65 S. Ct. 855, 324 U.S. 887; BERGER v U.S., Supra; SIMMONS v U.S., C.C.A. Tex. 1937, 89 F2d 591, Cert. Denied 58 S. Ct. 19, 302 U.S. 700; NATIONS v U.S. , Supra; LEWIS v U.S. C.C.A. Okl. 1926, 14 F2d 369; CHAFIN v U.S., Supra.

In U.S. v PARKER, D.C. N.J. 1938, 23 F. Supp. 880, it was said that under this section, the accused judge can consider only the legal sufficiency and timeliness of the affidavits of bias and prejudice and is precluded from refusing to recuse himself by an inquiry into or

discovery about the truth of the facts alleged.

Further in MORRIS v U.S., Supra, the rule appears that the trial judge is unauthorized to pass on the good faith of a defendant, filing an affidavit of prejudice.

We submit that in instant case, the comments of the Trial Court were concerned with the good faith of Appellant and not the legal sufficiency of his affidavit [TR. 11/21/61 P.4].

While it is true that some comment was made as to the timeliness of the filing [TR 11/21/61, P.4], yet as stated in the discussion of the first issue, an earlier filing was neither possible nor necessary since the judge herein involved was not assigned to the case until a scant four days prior to trial, one of which was a Sunday.

It is also true that the Trial Court made the statement that the affidavit was insufficient [TR. 11/21/61, P.4]. However, in so stating the court did not state in what manner the affidavit was insufficient nor did he make any comment concerning the alleged facts in ruling on said affidavit.

We therefore submit that Section 144 of Title 28, United States Code, is mandatory and not discretionary with the Trial Court; that instant affidavit was legally sufficient; and that therefore the Trial Court erred in

in not disqualifying himself prior to trial of this case.

WHEREFORE, Appellant respectfully prays that this court reverse the decision of the District Court of the United States.

Respectfully submitted,

LEONARD B. HANKINS
and
JAMES L. HAY
Attorneys for Appellant.
By: S/ Leonard B. Hankins

CERTIFICATE OF SERVICE

It is hereby certified that service of three (3) copies of this brief has been made on opposing counsel by mail in accordance with the rules of the United States Court of Appeals for the Ninth Circuit.

Dated: ~~March~~ April 2, 1962

S/ Leonard B. Hankins
Leonard B. Hankins